1995 **S.H. No. 95-120361**

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

CITY OF HALIFAX,
CITY OF DARTMOUTH,
HALIFAX COUNTY MUNICIPALITY, and
TOWN OF BEDFORD, **Plaintiffs**

- and -

ATTORNEY GENERAL OF NOVA SCOTIA,
Defendant

D E C I S I O N #2

HEARD: at Halifax, Nova Scotia before The Honourable Justice Walter R. E. Goodfellow on January 16th and February 22nd, 1996 with a decision given orally February 22, 1996

Conference call followed on June 18, 1996

DECISION: July 3, 1996

COUNSEL: Thomas J. Burchell, Q.C.
and Bruce H. Wildsmith, Q.C.
Solicitors for the Plaintiffs

Mark J. Covan,
Solicitor for the Defendant

GOODFELLOW, J.:

1. BACKGROUND

The Attorney General of Nova Scotia made an application to transfer the Originating Notice (Action) to Chambers which I heard on February 22, 1996. I rendered an oral decision at that time the written release of which was released February 26, 1996.

Counsel were unable to agree upon the form of the order. Initially they were unable to agree on the operative part; however, their differences in that respect have been resolved leaving outstanding different views by counsel as to what should comprise the recital of the order.

2. ORDER SOUGHT BY THE ATTORNEY GENERAL OF NOVA SCOTIA

ORDER

BEFORE THE HONOURABLE JUSTICE WALTER R. E. GOODFELLOW, IN CHAMBERS:

UPON an application having been made by the Attorney General of Nova Scotia, pursuant to Civil Procedure Rules 5, 9 and 37 and upon reading the affidavit and other materials on file herein;

AND UPON hearing Mark J. Covan on behalf of the Applicant, and Thomas J. Burchell, Q.C. on behalf of the Respondent;

AND UPON DETERMINING that the matter between the parties involves questions of law without a substantial dispute of fact;

3. ORDER SOUGHT BY THE CITY OF HALIFAX ET AL.

The City of Halifax and other plaintiffs wish the recital:

AND UPON DETERMINING that the matter between the parties involves questions of law without a substantial dispute of fact;

be **deleted.**

The substantive portions of order agreed upon:

UPON MOTION:

IT IS ORDERED THAT:

1. This proceeding be transferred to Chambers, to be proceeded with as an Application Inter Partes on the basis of the existing pleadings, further affidavits, and the admission of the Defendant that the amounts claimed as child apprehension costs are in fact the amounts owing if liability is established, as though the proceeding was originally commenced by Originating Notice (Application Inter Partes).

2. All process, pleadings, discoveries, and other matters that have taken place shall continue to form part of the record and may be used by any party in accordance with the Civil Procedure Rules.

3. Costs of the within application be and are hereby costs in the cause.

4. CIVIL PROCEDURE RULES

RULE 51
ORDERS

Form of order

51.01. (1) An order shall contain,

(a) the title of the proceeding;
(b) the name of the judge or officer who granted it;
(c) recitals of the proceedings on which it is based;
(d) the operative parts of the order divided into convenient

paragraphs and numbered consecutively;
(e) the date of the order; and
(f) the name and seal of the prothonotary who issued it.

(2) An order may be in Forms 51.01A to 51.01E, where applicable, with any variation that the circumstances require.

RULE 4
FORMS AND DOCUMENTS

Form

4.01. The forms in the appendices shall be used where applicable with such variations as the circumstances of the particular proceeding require.

5. DECISION - FORM OF ORDER

The decision I rendered February 22, 1996 addressed the matters set out in the two operative paragraphs of the order that are agreed upon, and the basis of my findings came from a consideration of the material before me and **Civil Procedure Rules** 5, 9 and 37 recited in both draft orders. My decision made a number of findings including:

Turning to the four identifiable issues:

1. Jurisdiction - The Province takes the position the statute overrides common law and equity;
2. **Limitations of Action Act** - There is no factual dispute this is a question of law.
3. What constitutes unjust enrichment. Here there is the argument by the Province that its overall responsibility towards children mitigates against any suggestion of unjust enrichment. Far more basic is that if there is no entitlement, there is no unjust enrichment. There is nothing before me to show any factual disagreement. It may

prove difficult, if not impossible for the plaintiffs to meet the requirements of unjust enrichment, but that is not before me, and what is before me is that what constitutes unjust enrichment is a question of law;

4. Whether unjust enrichment is a cause of action - This is a question of law.

6. CONCLUSION

It is clear from **Civil Procedure Rule** 51 (c) that an order shall contain "recitals of the proceedings on which it is based".

CPR 51.01(1) is mandatory "shall".

CPR 51.01 (1) (a) requires the title or heading of the proceeding to be on the order and 51.01 (1) (b) directs that the order shall contain the name of the Judge or officer who granted the order.

The next requirement is the one under review in this application, "what constitutes recitals of the proceedings on which it is based".

It is preferable if the recital contains an indication of the nature of the proceeding, ie. this action having come on for trial, or this application having been made by - name of party, in this case the Attorney General of Nova Scotia. Here the recital refers to the

specific Rules and therefore indicates to any reader the relief sought. This can be expressed as here, by reference to the specific Rules or by a recital indicating the Attorney General sought transferring this matter commenced by Originating Notice (Action) to Chambers. To constitute a complete brief recital of the proceedings endorses the preferable practice of reciting the names of counsel involved, the date of the application or hearing, ie. January 16, 1996 and February 22, 1996, the manner in which the decision was rendered, ie. orally or reserved and subsequently filed with the date of such filing, and finally the conclusion, ie. whether the application was dismissed or granted. Usually the recital will make reference to the conclusion or determination with respect to costs.

Incorporating the foregoing provides a clear and concise recital of the proceedings upon which the order is based. Specific findings ought not to be contained in the recital of an order. Findings are expressed in the decision and are encompassed in the relief directed which is set out in the substantive or operative parts of the order divided into convenient paragraphs and numbered consecutively. It is required by **CPR** 51.01 (1) (d).

Finally, and stating the obvious, the order must comply with the balance of **CPR** 51.01 by being dated and containing the name and seal of the Prothonotary who wishes the order.

In **Lee v. Lalonde** (1991), 50 C.P.C. (2d) 11, Veit, J., of the Alberta Court of Queens Bench, reviewed two forms of order presented to it following judgment in a motor vehicle

action and was asked by the plaintiff to issue an order to set out normally the basics required by the Alberta Rule comparable to our **CPR** 51 but with an extensive, detailed incorporation of some of the decision in the recital.

Veit, J. summarized the situation and concluded as follows:

> *Summary*
>
> Should a formal judgment attempt to deliver as much information as possible about the decision, or should it restrict itself to a bald statement of the decision made?
>
> The successful plaintiff proposes an expanded form of judgment which reveals some of the infrastructure of the decision. He suggests that such a form may be helpful for identifying issues on appeal.
>
> The defendant proposes a sparse form of judgment of the type usually seen in this jurisdiction.
>
> Especially where, as in this case, reasons in writing have been provided and will be available to the court of appeal, a judgment which only relates the actual decision is less likely to create additional problems and is therefore preferable.

The preferable form of order in this case is one deleting the objected to paragraph in the recital. Had this been a jury trial, the recital would properly contain the questions put to the jury and their answers. **Bauer v. Insurance Corporation of British Columbia** (1989), 38 B.C.L.R. (2d) 232.

In the end result, one should be able to peruse the recital in an order with the passage of time and know with a degree of certainty what was sought by whom, when and

with what result. The operative parts of the order should clearly set out the relief obtained. One should be able to review an order and understand fully what has transpired without the necessity of referring to any extraneous documents.

J.